

Appeal from a decision of the Oregon State Director, Bureau of Land Management, dismissing a protest against a portion of a dependent resurvey. Group No. 1229, OR.

Affirmed.

1. Bureau of Land Management—Federal Employees and Officers: Generally—Surveys of Public Lands: Dependent Resurveys

To the extent that cadastral surveyors employed by the Bureau of Land Management conduct a dependent resurvey of the public lands of the United States, pursuant to 43 U.S.C. § 772 (1988), to mark the boundaries of undisposed lands, a state licensing authority may not impose its requirements on such employees when they are engaged within the scope of their official duties.

2. Rules of Practice: Appeals: Burden of Proof—Surveys of Public Lands: Dependent Resurveys

An interested party challenging acceptance of a plat of a dependent resurvey must establish by a preponderance of the evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey.

APPEARANCES: Thom Seal, pro se and as President, Differential Energy, Inc., Prairie City, Oregon; Wayne M. Gardner, Chief, Branch of Cadastral Survey, Oregon State Office, Bureau of Land Management, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Thom Seal has appealed on behalf of himself and Differential Energy, Inc., 1/ from a decision of the Oregon State Director, Bureau of Land Management (BLM), dated May 16, 1990, dismissing a protest against a portion of the dependent resurvey of T. 12 S., R. 33 E., Willamette Meridian, Group No. 1229, Oregon. Appellants have challenged so much of the survey as reestablished the boundaries of Mineral Surveys Nos. 448 and 733, located within the W¹/₂ sec. 12 in the township. For reasons set forth below, we affirm the decision of the State Director.

Pursuant to a request dated August 18, 1983, a dependent resurvey of a portion of the boundaries of various mineral surveys, including Mineral Surveys Nos. 448 and 733, as well as the subdivision of certain sections within T. 12 S., R. 33 E., was authorized by Special Instructions dated August 23, 1984, for the purpose of facilitating a timber sale program and other administrative needs. Pursuant thereto, the resurvey by Phillip G. Griffin, Thomas E. Caster, and Rick A. McMullen, Cadastral Surveyors, commenced on September 5, 1984. In the course of running this resurvey, Griffin located the original common corner for secs. 11, 12, 13, and 14. 2/ This corner had previously been determined to be a lost corner in the course of a 1966-68 resurvey and had been reestablished by proportionate measurement approximately 2.76 chains from where Griffin recovered the original common corner. Griffin's discovery led to the issuance of Supplemental Special Instructions directing the resurvey and correction of various corners which had been reestablished in the 1966-68 survey based on the proportionate location of the common corner for secs. 11, 12, 13, and 14.

The fieldwork for the resurvey was completed on August 7, 1987. The field notes and plats of the resurvey were approved by the BLM Chief Cadastral Surveyor of Oregon on March 30, 1990. On that same date, the State Director rejected protests of the survey which had been filed by Seal on various dates commencing in March 1988. 3/ Seal thereupon pursued the instant appeal.

1/ In various submissions made to BLM, Seal has described himself as the President of Differential Energy, Inc., and as "Engineer" for that corporation, which he claims is a "lessee" of the land patented under Mineral Surveys Nos. 448 and 733. We believe that Seal has made a sufficient prima facie showing to represent himself and Differential Energy, Inc., before this Board. See 43 CFR 1.3(b)(3)(v).

2/ The original common section corner had been recovered by Griffin based on a tie from Mineral Survey No. 733. See Memorandum to File by Mike Gardner, dated June 25, 1986.

3/ In addition to lodging a number of protests against acceptance of the survey, Seal had earlier filed objection to the conduct of the survey unless various preconditions, which he sought to impose, were met. See Letter of Oct. 18, 1985.

In their statement of reasons for appeal (SOR), appellants reiterate many of the arguments made before the State Office in their protest of the survey. We will discuss these contentions seriatim to the extent we deem them relevant and probative of the acceptability of the challenged resurvey.

[1] Appellants assert that, since the BLM surveyors were not licensed, bonded, and certified by the State of Oregon as "registered professional land surveyors" under Oregon Revised Statutes 672.025, the BLM surveyors had no authority to survey private land within the State and that the survey of the exterior boundaries of patented mining claims was invalid. We also note that, by letter dated January 10, 1991, the Board of Engineering Examiners of the State of Oregon, pursuant to a complaint filed by Seal, informed this Board that "[i]t is the Board's opinion that ORS 672 clearly states that all surveys that establish lines, corners, monuments, etc., in Oregon affecting private land must be done by a registered Oregon Land Surveyor, or a person under his/her direct supervision and shall bear the signature of this P.L.S."

Notwithstanding the foregoing, the law is clear that, insofar as the Federal Government employs surveyors to fulfill statutory functions, the State licensing authority may not impose its requirements on such employees when engaged within the scope of their official duties. Indeed, in Johnson v. Maryland, 254 U.S. 51 (1920), the Supreme Court determined that the State of Maryland had no authority to require that employees of the Post Office obtain motor vehicle licenses as a precondition for operation of vehicles within the State. Justice Holmes, speaking for the Supreme Court, noted:

[T]he immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed.

Id. at 57. More recently, in a decision prohibiting the State of Florida from enjoining unlicensed individuals from practicing before the United States Patent Office, a unanimous Court, per Chief Justice Warren, noted that:

A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give "the State's licensing board a virtual power of review over the federal determination" that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress.

Sperry v. Florida, 373 U.S. 379, 385 (1963), citing Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 566 (1851).

That the cadastral surveyors employed by BLM herein were exercising authority derived from Congress is clear. Thus, the Act of March 3, 1909, as amended, 43 U.S.C. § 772 (1988), provides:

The Secretary of the Interior may * * * in his discretion cause to be made * * * such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: Provided, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.

While appellants are certainly free to challenge the resulting survey on the grounds that it is not an accurate retracement of the boundaries of the patented and unpatented lands and, therefore, it adversely affects their bona fide rights, the fact that the surveyors who executed the resurvey may not have been licensed by the State of Oregon is of no moment and affords no basis for challenging the results thereof. 4/

[2] Turning to the actual resurvey, we note that, while appellants assail the resurvey on numerous grounds (see SOR at 8-14), the fact of the matter is that they have totally failed to establish error in either the methodology used or the results obtained. Appellants variously allege that corner monuments were moved and that BLM accepted corner evidence which did not accord with the descriptions provided in the original record. Appellants, however, have provided absolutely no evidence in support of their former allegation and an examination of the field notes of the respective surveys discloses no support for the latter one.

4/ We note that the same conclusion was reached in a Sept. 27, 1977, memorandum from then Associate Solicitor Leshy, Division of Energy and Resources, to the Director, BLM.

As BLM noted in rejecting the protests below, the resurvey of Mineral Surveys Nos. 448 and 733 recovered six claim corners in their original position. In three of these cases, the resurvey recovered original corner monuments and, in another three, the corner was recovered based on an original bearing tree. Appellants' assertion to the contrary notwithstanding, the evidence recovered actually shows a marked fidelity to the record of the original surveys.

Mineral Survey No. 448 was executed by Charles M. Foster, United States Deputy Mineral Surveyor, on November 19, 20, and 21, 1901, originally covering four claims (the Prairie City, the Fraction, the Woodside, and the Wanona lodes) known collectively as the Prairie City Consolidated Quartz Claim. The claims trended generally north/south with the westernmost claim, the Fraction, abutting both the Prairie City and the Woodside claims along their west sidelines. According to the Foster survey, the Wanona claim abutted the Prairie City and Woodside claims along their east sidelines. ^{5/} The total acreage of the Prairie City Consolidated claim was determined to be 55.17 acres of which 15.85 acres were deemed to be included in the Wanona claim. On June 26, 1907, Mineral Survey No. 448 was cancelled with respect to the Wanona claim. Approximately 2 months later, Patent No. 41300 issued for the remaining claims, aggregating 39.32 acres. ^{6/}

Mineral Survey No. 733 was originally executed by Horace G. Pearson, United States Deputy Mineral Surveyor, on June 10 and 11, 1910, covering the Wanona claim. These survey returns indicate that corner No. 1 of the Wanona claim was identical with corner No. 4 of the Woodside claim. However, while the Foster survey of the Wanona claim had proceeded northward from this point on a line N. 2°57' W. a distance of 1,341.5 feet to corner No. 2 (which is identical with corner No. 3 of the Prairie City claim), the Pearson survey proceeded northward from corner No. 1 on a line N. 2°08' W. a distance of 1,335 feet before arriving at corner No. 2. Furthermore, while corner No. 3 of the Woodside claim (which is identical with corner No. 4 of the Prairie City claim) should have been located 285 feet north of corner No. 1 of the Wanona claim on the direct line between corners Nos. 1 and 2 of the Wanona, the Pearson field notes indicated that this corner was located 285 feet from corner No. 1 of the Wanona but on a bearing of

^{5/} Thus, the east sideline of the Prairie City and that portion of the Woodside adjacent to the Wanona were surveyed along a line S. 2°57' E., while the west sideline of the Wanona was surveyed along a line N. 2°57' W. See Field Notes of Mineral Survey No. 448 at 198, 202, and 205.

^{6/} We note that while the plat of Mineral Survey No. 448 contains a notation that patent issued on Aug. 20, 1907, the Historical Index shows patent issuance occurring on Aug. 22, 1907. It is unnecessary for us to resolve this discrepancy.

N. 2°23' W. Thus, the Pearson survey disclosed the existence of a small sliver of land in the shape of a triangle between the patented Prairie and Woodside lode claims and the then-unpatented Wanona lode claim.

Subsequently, the Pearson Wanona survey was, itself, amended pursuant to a survey conducted by Ira L. Hoffman on September 9, 1911. This amended survey was limited to the reestablishment of the east portion of the north endline and the extreme northerly portion of the east sideline, by the repositioning of corner No. 4 so that it was now located on a straight line bearing N. 82°45' E., 525.57 feet from corner No. 2. ^{7/} The ultimate effect of this amended survey was to exclude a triangle of land aggregating 0.456 acres from the northeast corner of the claim. The amended survey showed the claim as embracing 15.434 acres of land. Patent pursuant to the amended survey of the Wanona claim issued on April 11, 1912.

As noted above, the resurvey of the exterior boundaries of the claims recovered six original corners. These were corners Nos. 1, 4, and 5 of the Woodside, corners Nos. 2 and 4 of the Prairie City, and corner No. 5 of the Wanona. The remainder of the exterior corners (seven in number) were reestablished by the Grant Boundary method of corner restoration.

See Manual of Surveying Instructions, 1973 at 5-44. The resultant survey showed a maximum variation of 0°39' in bearing and 14.34 feet in distance compared to the original survey. ^{8/}

Appellants claim that the corners allegedly recovered by BLM do not match the description of the corners (apparently meaning the monuments) contained in the field notes of the original surveys and that, inter alia, "the bearing trees were taken to be on line while the original survey had them as offsets" (SOR at 9-10). In support of the former assertion, appellants aver that "[o]ne of the corners selected by the BLM was bigger than that described in the 1900's survey. It is hard to believe a post grew

^{7/} As originally surveyed by Pearson, the north endline proceeded from corner No. 2 on a line bearing N. 82°45' E. a distance of 300 feet at which point corner No. 3 was established. From corner No. 3 the line was surveyed on a bearing N. 46°45' E., for another 300 feet, at which point the original corner No. 4 was established. The Hoffman amended survey not only resulted in straightening the north endline; it also shortened the east sideline from 1,336 feet, as originally reported by Pearson, to a distance of 1,158.82 feet recorded by Hoffman.

^{8/} The greatest variation in distance was found between corners Nos. 1 and 5 of the Fraction claim, while the greatest variation in bearing was between corner No. 1 of the Woodside and No. 5 of the Fraction. Appellants' implicit assertion that there is a difference "of several degrees and tens of feet" between the original record of survey and the resurvey (see SOR at 11) is flatly wrong.

2 ft. in 80 years" (SOR at 8). Insofar as this allegation is concerned, appellants have, at a minimum, misinterpreted the record.

All three of the corners which were reestablished on the basis of original corner monumentation had, according to the field notes, originally been monumented either with a fir or pine post, 4 feet long, 4 inches square, set 18 inches in the ground and surrounded with a mound of earth (Woodside Nos. 4 and 5), or a fir post 4-1/2 feet long, 4-1/2 inches square, set 18 inches in the ground and surrounded with a mound of earth (Wanona No. 5). While it is true that the BLM resurvey reported the presence of wood posts of greater width than that mentioned in the original field notes at corners Nos. 4 and 5 of the Woodside lode claim, BLM did not assert that these wood posts constituted the remains of the original wood posts. Thus, for example, with respect to corner No. 4 of the Woodside, the field notes reported:

Corner No. 4 of Woodside Lode, Mineral Survey No. 448, identical with Cor. No. 1 of the Wanona Lode, Mineral Survey No. 733, monumented with the rotted remains of the bottom portion of the original wood post, in a post hole, in the center of a mound of stone, 3 1/2 ft. base, 1 ft. high, with the remains of a wood post, 6 ins. sq., 2 1/2 ft. long, alongside, no marks.

(Field Notes for Group No. 1229, Oregon, at 137).

Contrary to appellants' interpretation, while these field notes do assert that the rotted remains of the original wood post were still to be found in the post hole, they do not claim that the wood post found alongside the monument was part of the original monumentation. Moreover, we would point out that for two of the three corners for which Griffin found evidence of the original monumentation, he also found corroborating evidence in the form of original witness trees. Thus, for corner No. 5 of the Woodside claim, the original field notes recorded that "a pine, 10 ins. in diam. bears S. 69°45'W., 38 ft. dist., blazed inscribed Woodside 5-448-B.T.," whereas the resurvey reported "a ponderosa pine, 24 ins. diam., bears S. 69 3/4° W., 55 lks. [36.3 feet] dist. with healed blaze." Compare Field Notes for Mineral Survey No. 448 at 203 with Field Notes for Group No. 1229, Oregon, at 138. Similarly, for corner No. 5 of the Wanona claim, Pearson ^{9/} had noted that, from the original corner, "[a] pine, 12 ins.

^{9/} In its submission to the Board, BLM referred not to the Pearson survey in its comparison but to the earlier Foster survey of the claim. See BLM Response at 4. This was not a proper basis for comparison since the Foster survey of the Wanona claim was, as explained earlier in the text, cancelled on June 26, 1907. Thus, the record of the Pearson survey is the record properly considered.

dia. bears S. 28°40' E., 12.8 ft., blazed and scribed Wanona, 5-733, B.T." (Field Notes for Mineral Survey No. 733 at 356). The BLM resurvey reported that, from the recovered corner "[a] broken pine stump, 18 ins. diam., bears S. 28°40' E., 21 lks. [13.86 ft.] dist., with down pine alongside, with scribe marks COR 5 733 WANONA BT visible on exposed blaze. (Record and to face, 19.4 lks. [12.804 ft.])" (Field Notes for Group No. 1229, Oregon, at 141). We believe that the record totally belies appellants' challenge of BLM's claim that it recovered three corners based on original monumentation.

Similarly flawed is appellants' charge that the corners reestablished by the resurvey based on the recovery of witness trees should be rejected because "the bearing trees were taken to be on line while the original survey had them as offsets" (SOR at 10). The reality is that none of the bearing trees recovered in the resurvey were found "on line." See Field Notes for Group No. 1229, Oregon, at 132, 135, 137, 138, and 141. While appellants also assert that "the original survey notes of the 1900 do not describe the same species of bearing trees" (SOR at 10), this is simply not true. Every bearing tree recovered in the resurvey matched the species of the tree reported in the relevant original mineral survey. ^{10/} Appellants challenge to the bearing trees must be rejected.

Appellants also make numerous other unsubstantiated challenges to the correctness of the resurvey. ^{11/} But, as we have noted numerous times in the past, a party challenging a resurvey has the affirmative burden

^{10/} Thus, for corner No. 1 of the Woodside, Foster reported a fir and the BLM resurvey recovered a fir stump; for corner No. 2 of the Prairie City, Foster described a pine and BLM recovered a ponderosa pine; for corner No. 4 of the Prairie City, Foster reported a fir and BLM found a fir snag; for corner No. 5 of the Woodside, Foster recorded two pines and BLM recovered a ponderosa pine; and for corner No. 5 of the Wanona, Pearson reported a pine and BLM recovered a pine stump with a down pine alongside. No witness trees had been left with respect to the original survey of corner No. 4 of the Woodside.

^{11/} To the extent that any part of the protest is premised on the recovery of the original common section corner for secs. 11, 12, 13, and 14, BLM is absolutely correct in noting that, having recovered original monumentation of the mineral surveys on the ground, the location of the common section corner would have no bearing on the location of the patented land since the location, as marked on the ground, controls over any contrary calls or acreage computation. Moreover, since the rediscovery of the original common section corner was, itself, directly occasioned from a tie-in of

the Wanona claim by Griffin, it seems passing strange to suggest that the rediscovered section corner somehow undermines the reliability of the BLM resurvey of the claim boundaries.

of establishing, by a preponderance of the evidence, that the resurvey is not an accurate retracement and reestablishment of the lines of survey. See, e.g., John W. Yeargan, 126 IBLA 361, 363 (1993); James O. Steambarge, 116 IBLA 185, 188 (1990); Peter Paul Groth, 99 IBLA 104, 111 (1987). This burden is not discharged merely by conjuring up a profusion of charges which either lack substance or raise matters which are not relevant to the issues involved. Appellants have simply not met their burden of showing that the resurvey was not an accurate retracement of the exterior lines of Mineral Surveys Nos. 448 and 733.

We have considered all of appellants' other arguments but find that they fail to establish error in either the principles guiding the conduct of the survey or the manner in which it was carried out. Appellants have also requested a fact-finding hearing pursuant to 43 CFR 4.415. In view of the foregoing, this request is hereby denied since the record amply demonstrates that no beneficial purpose would be served by granting the request.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

I concur.

Bruce R. Harris
Deputy Chief Administrative Judge